U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass 3/F
425 I Street N.W.
Washington, D.C. 20536

PUBLIC COPY

[redacted]

MAR 17 2004

File: LIN 02 106 52539 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and argues that the petitioner has financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is November 14, 2000. The beneficiary's salary as stated on the labor certification is $1,690 per month or $20,280 annually.

The petition was filed on February 8, 2002. As evidence of its ability to pay, the petitioner stated in a letter accompanying the petition, that it had provided "proof of petitioner's ability to pay." As subsequently noted by the director, the file did not contain such evidence, so on April 3, 2002, the director requested further evidence relevant to the petitioner's ability to pay pursuant to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2). The director advised the petitioner to provide

evidence supporting its continuing ability to pay the proposed salary as of November 14, 2000, including either its latest annual report, latest federal tax return, or an audited financial statement.

In response, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the calendar year 2000. It was labeled on page one as a "preliminary form." The information on page one of this tax return also reflects that is a "draft as of 6/14/2000." The name of the filer is stated as "Irmita's," but with a different address as that given on the labor certification and the visa petition. The tax return indicates that the effective date of its election as an S corporation is March 5, 1999. "Pete Garcia" is identified as a 50 percent shareholder. This tax return also indicates that it was being filed as an amended return. The petitioner did not submit a copy of the originally filed return or evidence of IRS confirmation, and provided no clarification or other evidence as requested by the director. The preliminary amended return appears to indicate that the petitioner will declare $44,189 as ordinary income for the calendar year 2000.

The director denied the petition. He determined that the petitioner had not established its continuing ability to pay the beneficiary's proffered wage as of the priority date of the visa petition. He noted that the petitioner had been requested to submit one of the three types of evidence described at 8 C.F.R. § 204.5(g)(2), although observing that the 2000 tax return seemed to indicate that sufficient funds might have been available to meet the proposed salary for that year.

For the first time on appeal, counsel argues that the most recent federal tax return had already been provided as of the petitioner's June 11, 2002 response to the director's request for evidence, and that the 2001 tax return had not been available. The petitioner provides no enlightenment why a draft copy of an amended return for 2000 was submitted rather than proof of the actual original tax return filed or other acceptable evidence within the parameters of 8 C.F.R. § 204.5(g)(2).

With the appeal, an unsigned, undated copy of a 2001 Form 1120S, U.S. Income Tax Return for an S Corporation is submitted. This tax return is filed under a different name than that given on either the visa petition or the labor certification; has a different address; and a completely different employer tax identification number. The principal shareholder is identified as "Pete Garcia," but he is listed as holding 100 percent of the shares in the filing corporation. The date of incorporation is given as March 02, 2001. This tax return indicates that the filer declared $44,573 in ordinary income for the calendar year of 2001.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). In this case, however, there are several gaps in the evidence provided and no persuasive explanations are provided to resolve tax return discrepancies related to the financial ability of the petitioner to pay the beneficiary's proposed salary. It is noted that the director's request for additional evidence specifically requested evidence within the guidelines of 8 C.F.R. §

204.5(g)(2), but the petitioner only provided a draft copy of an amended return and no explanation until the denial had been rendered and the appeal filed. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano,* 19 I&N Dec. 764, 766 (BIA 1988). The regulation at 8 C.F.R. § 103.2(b)(12) also provides that where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed, an application will be denied.

We cannot find that the director erred in denying the petition. A brief review of the tax return submitted on appeal provides no further illumination, as it raises questions as to the identity of the filer as compared to the petitioner who filed the visa petition and labor certification. The evidence submitted prior to and after the director's denial couldn't be concluded to credibly support the petitioner's continued ability to pay the beneficiary's proposed salary. It is the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988). Based on the evidence in this record, however, we cannot conclude that the discrepancies between the tax returns were satisfactorily resolved or that the petitioner has convincingly demonstrated its continuing ability to pay the beneficiary's proffered salary of $20,280 as of the visa priority date of November 14, 2000.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.